

ESTTA Tracking number: **ESTTA936978**

Filing date: **11/23/2018**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91233690
Party	Defendant Rusty Ralph Lemorande
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Submission	Motion for Default Judgment
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Date	11/23/2018
Attachments	MOTION FOR SANCTIONS.NOLD.UPLOADED .pdf(205712 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE
THE TRADEMARK TRIAL AND APPEAL BOARD**

Serial No: 87090468
Publication date: 11/29/2016
Opposition Number: 91233690
For the Mark: NIGHT OF THE LIVING DEAD

)	
Rusty Lemorande <i>in pro per</i>)	
)	
Petitioner,)	
)	
v.)	
)	
IMAGE 10, INC.)	
)	
Respondent.)	
)	

**APPLICANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR
SANCTIONS FOR OPPOSER'S FAILURE TO PROVIDE DISCOVERY AS
REQUESTED AND ORDERED,
PURSUANT TO 37 CFR §2. 120(g).**

Now comes the Applicant, Rusty Lemorande, moving for an Order dismissing the pending Opposition as a result of Opposer's failure to provide documents requested after various inquiries, three Motions to Compel, and two Orders by the TTAB (the Board).

As previous TTAB orders in this matter have noted, any paper filed during the pendency of a motion which is not relevant thereto will be given no consideration. (Trademark Rule 2.127(d).

Applicant believes the instant Motion is relevant to his previously and most recently filed Motion, and, therefore, believes it is appropriate and timely submitted. If the Board views the matter differently, Applicant respectfully requests that the Board dismiss this motion without prejudice.

GENERAL REVIEW

TTAB practice provides that if any party to an Opposition fails to produce and permit the inspection and copying of any document or thing, the party seeking discovery must first make a good faith effort to resolve the dispute prior to filing a motion for an order to compel production. However, the Board notes in its rule, unlike a Motion to Compel Discovery, there is no requirement to make a good faith effort to resolve the parties' dispute prior to filing a motion for discovery sanctions.

Applicant also notes that the Board will not enter into sanctions unless a previous Board order relating to discovery has been violated. Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co., 55 USPQ2d 1848, 1854 (TTAB 2000), No Fear Inc. v. Rule, 54 USPQ2d 1551, 1553 (TTAB 2000).

BACKGROUND

Opposer's non-compliance has already egregiously prolonged this litigation, now almost three years in process. Applicant, after multiple requests for documents, and salient information via interrogatories, is still left to guess as to what evidence, if any, Opposer has to support its contentions. As a result, Applicant is unable to formulate any plan for properly and fairly opposing the Opposition, and, therefore, is left to speculate about Opposer's contentions. In addition to the litigation prejudice caused by this failure, Applicant suffers other prejudice caused by expense and delay. Therefore, Applicant respectfully believes that the Board will determine that Applicant has been prejudiced by Opposer's failures, and order dismissal with prejudice of this action, or other sanction as described below.

Specifically, Applicant notes that three orders of the Board requiring Opposer to submit information as requested have been violated. In addition, Opposer has, since the beginning of its Opposition - approximately two years ago - produced not one document, using boilerplate

objections repeatedly, in addition to responding to many interrogatories with nothing but boilerplate objections, and repeatedly tardily responded to Applicant's meet-and-confer queries, often not at all.

Opposer has also failed, after several requests, to provide a privilege log for its repeated boilerplate claims of privileges.

Opposer also filed an untimely Summary Judgment motion, causing Applicant to draft a response unnecessarily, and further causing the Board to direct its resources to read, review and respond unnecessarily.

In addition, Applicant has attempted to schedule depositions with Opposer, frustrated by its refusal to provide reasonable, customary and salient documents which would evidence core principles in Opposer's opposition, (or possibly cause Applicant to withdraw his application), such documents and interrogatory responses necessary prior to depositions being taken, further delaying the Opposition and, therefore, Applicant's good faith and bona fide business intentions.

INTERFERENCE WITH THE JUDICIAL PROCESS

The failure to provide relevant documents, after multiple requests, and also to reply fairly to pertinent interrogatories, halts and stymies the rest of the opposition proceeding, and interferes with the judicial process.

Nothing further can be accomplished in assessing the case and moving it toward a meaningful disposition without such fairly requested responses. Opposer has willfully thwarted the Board's attempt to make these proceedings smoother, more efficient and orderly, and Applicant respectfully believes the Board will determine that Opposer's acts and omissions have significantly interfered with the judicial process. For all these reasons, Applicant believes sanctions are in order and, therefore, makes such request for the above-

stated reasons and the general observation and belief that Opposer's litigation strategy from the beginning has been nothing more than an attempt to confuse, frustrate and obfuscate - and, therefore, not to engage in fair discovery - in the expectation that Applicant, being *in pro per*, would merely give up and simply go away.

That is not the role of justice in its most conceptual form which is not only balanced in its determination of fairness, but also blind to the experiential status of any party seeking his or her day in court.

AS TO RULE 37(b)(2)

Trademark Rule 2.120(g)(1) provides, in pertinent part (emphasis added):

If a party... fails to comply with an order of the Trademark Trial and Appeal Board relating to disclosure or discovery, ... the Board may make any appropriate order, including those provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure.

Rule 37(b)(2) of the Federal Rules of Civil Procedure provides for the following "just orders" where a party fails to obey an order to provide or permit discovery:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part; or

(vi) rendering a default judgment against the disobedient party.

As to item (vi), the TTAB has noted on many occasions that default judgment is a harsh remedy but may be justified where no less drastic remedy would be effective, and there is a strong showing of willful evasion. Applicant respectfully asserts that there has been a showing of willful evasion by Opponent, and, therefore, the remedy of default is justified as a result of Opposers continual and willful thwarting of the Board's attempts to make these proceedings smoother, more efficient and orderly through its several orders. As a result, Applicant respectfully submits that the Board should determine that Opposer's acts and omissions significantly have interfered with judicial process and will continue to do so if sanctions are not granted.

**SANCTIONS ONLY APPROPRIATE WHEN A MOTION TO COMPEL HAS BEEN
FILED AND THEN GRANTED**

Applicant also notes that: “*A motion for sanctions is only appropriate if a motion to compel these respective disclosures has already been granted.*” Final Rule, 72 F.R. at 42256. (MHW Ltd. v. Simex, Aussenhandelsgesellschaft Savelsberg KG, 59 USPQ2d 1477, 1478 (TTAB 2000) (“*The law is clear that if a party fails to comply with an order of the Board relating to discovery, including an order compelling discovery, the Board may order appropriate sanctions as defined in Trademark Rule 2.120(g)(1) and Fed. R. Civ. P. 37(b)(2), including entry of judgment [citations omitted].*”).

Such sanctions might, in the alternative, result in an order precluding opposer from relying at trial on information or documents which should have been disclosed (Cf. Presto Products Inc. v. Nice-Pak Products Inc., 9 USPQ2d 1895, 1896 n.5 [TTAB 1988]), or an order

barring opposer from later introducing information which it did not produce. (See TBMP § 527.01(e)(2d ed. rev. 2004).

The case, Taser International, Inc. v Phazzer Electronic, Inc. (Case no 6:16-cv-366-Orl-40KRS, 2017 U.S. Dist. LEXIS 183006 (M.D. Fla. July 21, 2017), a mixed patent and trademark case) seems relevant to the instant matter.

In an order granting terminating sanctions, the *Taser* Court began by summarizing the “abusive litigation and discovery practices” it found the Defendant undertook during the litigation. Specifically, the Court noted that after three motions to compel, and after the case had been ongoing for nearly a year, plaintiff “TASER still has “*not received the most basic information regarding the details and relationships between Phazzer and its manufacturer/suppliers/distributors of the accused . . . [infringing] product.*”

As in the instant matter, the *Taser* court, in prior orders responding to Motions to Compel, instructed the Opposer to produce documents, and a privilege log where privileges were asserted.

And as in *Taser*, Opposer in the instant action has continuously failed to provide documents or privilege logs, (and complete responses to interrogatories) after three motions to compel, with subsequent orders by the TTAB compelling such documents in the first two instances. And, as in *Taser International*, or even worse, it has been nearly two years still with no proper responses from the Opposer, despite orders to compel from the Board.

It seems clear that Opposer has been 'gaming' the system from almost the commencement of its Opposition proceeding, for which Applicant respectfully submits that the appropriate sanction is dismissal with prejudice.

AS TO WITHDRAWAL OF OPPOSER’S COUNSEL

The recent withdrawal of Opposer's counsel only further delays this proceeding and, therefore continues to prejudice Applicant greatly, including the loss of income for his proposed *bona fide* and in-good-faith business plans (the subject of the Intent-To-Use application which is the subject of the Opposition.)

ATTEMPTS TO RESOLVE

Petitioner has attempted to resolve these discovery matters cordially and professionally over the past two years. As of this date, there has been no resolution or apparent good -faith effort towards resolution. It has therefore become clear that these disputes cannot be resolved between the parties.

CERTIFICATION OF GOOD FAITH EFFORT TO RESOLVE DISPUTE

In accordance with Trademark Rule 2.120(e), Petitioner hereby certifies that he has made a good faith effort to resolve the issues presented in this motion. (*See* Exhibits A and B.)

CONCLUSION

WHEREFORE, Applicant prays that the Board, pursuant to 37 CFR § 120 (g) (1) and Fed. R. Civ. P. 37 (b) (2) (C) dismiss this Opposition with prejudice for willful and continuing failure to comply with the rules governing discovery, and specifically with the Board's prior orders, or, in the alternative, order lesser sanctions as described in Rule 37(b)(2) of the Federal Rules of Civil Procedure.

Respectfully submitted,

/R. H. Lemorande/

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Applicant In Pro Per

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading was sent via First Class Mail this 23rd day\of November, 2018, to Opposer, Image 10 at 216 Euclid Avenue Glassport, PA 15045 (address as filed and posted on the USPTO website), with a courtesy copy emailed to Michael Meeks and Farah Bharatti at mmeeks@buchalter.com, and fbhatti@buchalter.com, respectively, withdrawing counsel to Image 10, Opposer.